SECTION 102(b) REPORT

Review and Report on the Applicability to the Legislative Branch of Federal Laws Relating to Terms and Conditions of Employment and Access to Public Services and Public Accommodations

Prepared by the Board of Directors of the Office of Compliance
Pursuant to Section 102(b) of the Congressional Accountability Act of 1995, 2 U.S.C. § 1302(b)

December 31, 1998

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GLOSSARY OF ACRONYMS AND DEFINED TERMS

The following acronyms and defined terms are used in this Report and Appendices:

1996 Section 102(b) Report — the first biennial report mandated by § 102(b) of the Congressional Accountability Act of 1995, which was issued by the Board of Directors of the Office of Compliance in December of 1996.

1998 Section 102(b) Report — this, the second biennial report mandated under § 102(b) of the Congressional Accountability Act of 1995, which is issued by the Board of Directors of the Office of Compliance on December 31, 1998.

ADA — Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq.

ADEA — Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq.

ADR — alternative dispute resolution.

AG — Attorney General.

Board — Board of Directors of the Office of Compliance.

CAA — Congressional Accountability Act of 1995, 2 U.S.C. § 1301 et seq.

CAA laws — the eleven laws, applicable in the federal and private sectors, that are made applicable to the legislative branch by the CAA and are listed in section 102(a) of that Act.

CG — Comptroller General.

Chapter 71 — Chapter 71 of title 5, United States Code.

DoL — Department of Labor.

EEO — equal employment opportunity.

EEOC — Equal Employment Opportunity Commission.

EPA — Equal Pay Act provisions of the Fair Labor Standards Act, 29 U.S.C. § 206(d).

EPPA — Employee Polygraph Protection Act of 1988, 29 U.S.C. § 2001 et seq.

FLRA — Federal Labor Relations Authority.

FLSA — Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq.

FMLA — Family and Medical Leave Act of 1993, 29 U.S.C. § 2611 et seq.

GAO — General Accounting Office.

GAOPA — General Accounting Office Personnel Act of 1980, 31 U.S.C. § 731 et seq.

Glossary of Acronyms and Defined Terms (continued)

GC — General Counsel. Depending on the context, "GC" may refer to the General Counsel of the Office of Compliance or to the General Counsel of the GAO Personnel Appeals Board.

GPO — Government Printing Office.

Library — Library of Congress.

MSPB — Merit Systems Protection Board.

NLRA — National Labor Relations Act.

NLRB — National Labor Relations Board.

OC — Office of Compliance.

Office — Office of Compliance.

OPM — Office of Personnel Management.

OSH — occupational safety and health.

OSHAct — Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq.

PAB — Personnel Appeals Board of the General Accounting Office.

PPA — Portal-to-Portal Act of 1947, 29 U.S.C. § 251 et seq.

RIF — reduction in force.

Section 230 Study — the study mandated by section 230 of the Congressional Accountability Act of 1995, which was issued by the Board of Directors of the Office of Compliance in December of 1996.

Title VII — Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

ULP — unfair labor practice.

USERRA — Section 2 of the Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U.S.C. chapter 43.

VEOA — Veterans Employment Opportunities Act of 1998, Pub. Law No. 105-339.

WARN Act — Worker Adjustment and Retraining Notification Act, 29 U.S.C. § 2101 et seq.

EXECUTIVE SUMMARY

In this Report, issued under section 102(b) of the Congressional Accountability Act of 1995 ("CAA"), the Board of Directors of the Office of Compliance reviews new statutes or statutory amendments enacted after the Board's 1996 Report was prepared, and recommends that certain other inapplicable laws should be made applicable to the legislative branch. In the second part of this Report, the Board reviews inapplicable provisions of the private-sector laws generally made applicable by the CAA (the "CAA laws"),[1] and reports on whether and to what degree these provisions should be made applicable to the legislative branch. Finally, the Board reviews and makes recommendations on whether to make the CAA or another body of laws applicable to the General Accounting Office ("GAO"), the Government Printing Office ("GPO"), and the Library of Congress ("Library").

Part I

After reviewing all federal laws and amendments relating to terms and conditions of employment or access to public accommodations and services passed since October, 1996, the Board concludes that no new provisions of law should be made applicable to the legislative branch. Two laws relating to terms and conditions of employment were amended, but substantial provisions of each law have already been made applicable to the legislative branch. However, the provisions of private-sector law which the Board identified in 1996 in its first Section 102(b) Report as having little or no application in the legislative branch have not yet been made applicable, and the Board's experience in the administration and enforcement of the Act in the two years since that first report was submitted to Congress has raised several new issues.

Based on the work of the 1996 Section 102(b) Report, the Board makes the following two sets of recommendations.

(1) The Board resubmits the recommendations made in the 1996 Section 102(b) Report that the following provisions of laws be applied to employing offices within the legislative branch: Prohibition Against Discrimination on the Basis of Bankruptcy (11 U.S.C. § 525); Prohibition Against Discharge from Employment by Reason of Garnishment (15 U.S.C. § 1674(a)); Prohibition Against Discrimination on the Basis of Jury Duty (28 U.S.C. § 1875); Titles II and III of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000(a) to 2000a-6, 2000b to 2000b-3) (prohibiting discrimination on the basis of race, color, religion, or national origin regarding the goods, services, facilities,

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[1] This report uses the term "CAA laws" to refer to the eleven laws, applicable in the federal and private sectors, made applicable to the legislative branch by the CAA and listed in section 102(a) of that Act.

privileges, advantages, and accommodations of any place of public accommodation as defined in the Act).

(2) After further study of the whistleblower provisions of the environmental laws (15 U.S.C. § 2622; 33 U.S.C. § 1367; 42 U.S.C. §§ 300j–9(i), 5851, 6971, 7622, 9610) on which the Board had previously deferred decision, the Board now concludes that the better construction of these provisions is that they cover the legislative branch. However, because arguments could be made to the contrary, the Board recommends that language should be added to make clear that all entities within the legislative branch are covered by these provisions.

Based on its experience in the administration and enforcement of the Act and employee inquiry since the 1996 Report was issued, the Board makes the following two recommendations:

(1) Employee "whistleblower" protections, comparable to those generally available to employees covered by 5 U.S.C. § 2302(b)(8), should be made applicable to the legislative branch[2] to further the institutional and public policy interest in preventing reprisal or intimidation for the disclosure of information which evidences fraud, waste, or abuse or a violation of applicable statute or regulation.

(2) The Board has found that Congress has created a number of special-purpose study commissions in which some or all members are appointed by the Congress. These commissions are not listed as employing offices under the CAA and, in some cases, such commissions may not be covered by other, comparable protections. The Board therefore believes that the coverage of such special-purpose study commissions should be clarified.

Part II

Having reviewed all the inapplicable provisions of the private-sector CAA laws,[3] the Board focuses its recommendations on enforcement,[4] the area in which Congress

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[2] Such protections are already generally available to employees at GAO and GPO.

[3] The table of the private-sector provisions of the CAA laws not made applicable by the CAA, set forth in Appendix I to this Report, details these exceptions.

[4] The private-sector enforcement authority tables, set forth in Appendix II to this Report, summarize the enforcement authorities afforded to the implementing executive-branch agencies under the private-sector laws made applicable by the CAA in those areas in which the CAA does not already grant enforcement authority to the Office.

made the most significant departures from the private-sector provisions of the CAA laws.

The Board makes the following specific recommendations of changes to the CAA:

(1) grant the Office the authority to investigate and prosecute violations of section 207 of the CAA, which prohibits intimidation or reprisal for opposing any practice made unlawful by the Act or for participation in any proceeding under the Act;

(2) clarify that section 215(b) of the CAA, which makes applicable the remedies set forth in section 13(a) of the Occupational Safety and Health Act of 1970 ("OSHAct"), gives the General Counsel the authority to seek a restraining order in district court in the case of imminent danger to health or safety; and

(3) make the record-keeping and notice-posting requirements of the private-sector laws applicable under the CAA.

The Board also makes the following general recommendations:

(4) extend the benefits of the model alternative dispute resolution system created by the CAA to the private and federal sectors to provide them with the same efficient and effective method of resolving disputes that the legislative branch now enjoys; and

(5) grant the Office the other enforcement authorities exercised by the agencies which implement those CAA laws for the private sector in order to ensure that the legislative branch experiences the same burdens as the private sector.

The Board further suggests that, to realize fully the goals of the CAA – to assure that "congressional employees will have the civil rights and social legislation that has ensured fair treatment of workers in the private sector" and to "ensure that Members of Congress will know firsthand the burdens that the private sector lives with"[5] – all inapplicable provisions of the CAA laws should, over time, be made applicable.

Part III

The Board identifies three principal options for coverage of the three instrumentalities:

(1) CAA Option – Coverage under the CAA, including the authority of the Office of Compliance as it administers and enforces the CAA (as the CAA would be modified by enactment of the recommendations made in Part II of this Report.)

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[5] 141 CONG. REC. S441 (daily ed. Jan. 9, 1995) (statement of Senator Grassley).

(2) Federal-Sector Option – Coverage under the statutory and regulatory regime that applies generally in the executive branch of the federal sector, including the authority of executive-branch agencies as they administer and enforce the laws in the federal sector.

(3) Private-Sector Option – Coverage under the statutory and regulatory regimes that apply generally in the private sector, including the authority of the executive-branch agencies as they administer and enforce the laws in the private sector.[6]

The Board compared these options with the current regimes at GAO, GPO, and the Library, identifying the significant effects of applying each option.[7]

The Board concludes that coverage under the private-sector regime is not the best of the options it considered. Members Adler and Seitz recommend that the three instrumentalities be covered under the CAA, with certain modifications, and Chairman Nager and Member Hunter recommend that the three instrumentalities be made fully subject to the laws and regulations generally applicable in the executive branch of the federal sector.

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The analysis and conclusions in this report are being made solely for the purposes set forth in section 102(b) of the Congressional Accountability Act of 1995. Nothing in this report is intended or should be construed as a definitive interpretation of any factual or legal question by the Office of Compliance or its Board of Directors.

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The Board of Directors of the Office of Compliance gratefully acknowledges the contributions of Lawrence B. Novey and Eugenie N. Barton for their work on this report.

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[6] The coverage described in each of the three options would supersede only provisions of law which provide substantive rights analogous to those provided under the CAA or which establish analogous administrative, judicial, or rulemaking processes to implement, remedy, or enforce such rights. Substantive rights under federal-sector or other laws having no analogue in the CAA, and processes used to implement, remedy, or enforce such rights, would not be affected by the coverage described in the three options.

[7] The comparisons, which are presented in detail in tables set forth in Appendix III to this Report, cover the CAA, the laws made applicable by the CAA, analogous laws that apply in the federal sector and the private sector, and mechanisms for applying and enforcing them.

SECTION 102(b) REPORT

INTRODUCTION

Congress enacted the Congressional Accountability Act of 1995 ("CAA") so that there would no longer be "one set of protections for people in the private sector whose employees are protected by the employment, safety and civil rights laws, but no protection, or very little protection, for employees on Capitol Hill,"[8] and to "ensure that Members of Congress will know firsthand the burdens that the private sector lives with."[9] Thus, the CAA provides employees of the Congress and certain congressional instrumentalities with the protections of specified provisions of eleven federal employment, labor, and public access laws. (This Report refers to those laws as the "CAA laws").[10] Further, the Act generally applies the same substantive provisions and judicial remedies of the CAA laws as govern employment and public access in the private sector to ensure that Congress would live under the same laws as the rest of the nation's citizens.

However, the Act departed from the private-sector model in a number of significant respects. New institutional, adjudicatory, and rulemaking models were created. Concerns about subjecting itself to regulation, enforcement or administrative adjudication by executive-branch agencies led Congress to establish an independent administrative agency in the legislative branch, the Office of Compliance (the "OC" or the "Office"), to administer and enforce the Act. The Office's administrative and enforcement authorities differ significantly from those in place at the executive-branch

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[8] 141 CONG. REC. S622 (daily ed. Jan. 9, 1995) (statement of Senator Grassley).

[9] *Id.* at S441.

[10] The nine private-sector laws made applicable by the CAA are: the Fair Labor Standards Act of 1938 (29 U.S.C. § 201 et seq.) ("FLSA"), Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) ("Title VII"), the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.) ("ADA"), the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621 et seq.) ("ADEA"), the Family and Medical Leave Act of 1993 (29 U.S.C. § 2611 et seq.) ("FMLA"), the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 et seq.) ("OSHAct"), the Employee Polygraph Protection Act of 1988 (29 U.S.C. § 2001 et seq.) ("EPPA"), the Worker Adjustment and Retraining Notification Act (29 U.S.C. § 2101 et seq.) ("WARN Act"), and section 2 of the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). The two federal-sector laws made applicable by the CAA are: Chapter 71 of title 5, United States Code (relating to federal service labor-management relations) ("Chapter 71"), and the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.).

agencies which administer and enforce the eleven CAA laws for the private sector and/or the federal-sector. Most notably, the Act did not grant the OC independent investigation and prosecutorial authority comparable to that of analogous executive-branch agencies. Instead, the Act created new, confidential administrative dispute resolution procedures, including compulsory mediation, as a prerequisite to access to the courts. Finally, the Act granted the OC limited substantive rulemaking authority. Substantive regulations under the CAA are adopted by the Board of Directors (the "Board"). The House and Senate retained the right to approve those regulations, but the CAA provides that, in the absence of Board action and congressional approval, the applicable private-sector regulations or federal-sector regulations apply, with one exception involving labor-management relations.[11]

In terms of substantive law, the Act did not include some potentially applicable laws and made applicable only certain provisions of the CAA laws. Moreover, the Act applied the Federal Labor-Management Relations Act, 5 U.S.C. chapter 71 ("Chapter 71"), rather than the private-sector model, and gave the Board authority to create further exclusions from labor-management coverage if the Board found such exclusions necessary because of conflict of interest or Congress's constitutional responsibilities.[12]

Finally, the CAA was not made applicable throughout the legislative branch. The CAA only partially covered the three largest instrumentalities of the Congress, the General Accounting Office ("GAO"), the Government Printing Office ("GPO"), and the Library of Congress (the "Library"), which were already covered in large part by a variety of different provisions of federal-sector laws, administered by the three instrumentalities themselves and/or executive-branch agencies.

Congress left certain areas to be addressed later, after further study and recommendation, as provided for by sections 102(b) and 230 of the Act. To promote the continuing accountability of Congress, section 102(b) of the CAA required the Board to review biennially all provisions of federal law and regulations relating to the terms and conditions of employment and access to public services and accommodations; to report on whether or to what degree the provisions reviewed are applicable or inapplicable to the legislative branch; and to recommend whether those provisions should be made applicable to the legislative branch. Additionally, section 230 of the CAA mandated a study of the status of the application of the eleven CAA laws to GAO, GPO, and the Library, to "evaluate whether the rights, protections, and procedures, including administrative and judicial relief, applicable to [these instrumentalities]. . . are

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[11] With respect to the offices listed in § 220(e)(2) of the CAA, the application of rights under Chapter 71 shall become effective only after regulations regarding those offices are adopted by the Board and approved by the House and Senate. *See* §§ 220(f)(2), 411, of the CAA.

[12] *See* § 220(e) of the CAA.

comprehensive and effective . . . includ[ing] recommendations for any improvements in regulations or legislation."[13] These reports were to review aspects of legislative-branch coverage which required further study and recommendation to the Congress once the OC and its Board had gained experience in the administration of the Act and Congress had gained experience in living under the Act.

1996 Section 102(b) Report. In December of 1996, the Board completed its first biennial report mandated under section 102(b) of the CAA (the "1996 Section 102(b) Report"), which reviewed and analyzed the universe of federal law relating to labor, employment and public access, made the Board's initial recommendations, and set priorities for future reports.[14] To conduct its analysis, the Board organized the provisions of federal law in tabular form according to the kinds of entities to which they applied, and systematically analyzed whether and to what extent they were already applicable to the legislative branch or whether the legislative branch was already covered by other comparable legislation. This generated four tables: the first listed and reviewed those provisions of law generally applicable in the private sector and/or in state and local government that also are already applicable to entities in the legislative branch, a category which included nine of the laws made applicable by the CAA. The second table contained and reviewed those provisions of law that apply only in the federal sector, a category which included the two exclusively federal-sector laws applied to the legislative branch by the CAA. The third table listed and reviewed five private-sector and/or state- and local-government provisions of law that do not apply in the legislative branch, but govern areas in which Congress has already applied to itself other, comparable provisions of law. The last table listed and reviewed thirteen other private-sector laws which do not apply or have only very limited application in the legislative branch.

The Board then turned to its task of recommending which statutes should be applied to the legislative branch. In light of the large body of statutes that the Board had identified and reviewed, the Board determined that it could not make recommendations concerning every possible change in legislative-branch coverage, for "that would be the

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[13] 2 U.S.C. § 1371(c). Originally, the Administrative Conference of the United States was charged with carrying out the study and making recommendations for improvements in the laws and regulations governing the instrumentalities, but when the Conference lost its funding, the responsibility for the study was transferred to the Board.

[14] SECTION 102(b) REPORT: REVIEW AND REPORT OF THE APPLICABILITY TO THE LEGISLATIVE BRANCH OF FEDERAL LAW RELATING TO TERMS AND CONDITIONS OF EMPLOYMENT AND ACCESS TO PUBLIC SERVICES AND ACCOMMODATIONS (Dec. 31, 1996).

work of many years and many hands."[15] The Board further recognized that biennial nature of report, as well as the history and structure of the CAA, argued "for accomplishing such statutory change on an incremental basis."[16]

In setting its priorities for making recommendations from among the categories of statutes that the Board had identified for analysis and review, the Board sought to mirror the priorities of the CAA. Because legislative history suggested that highest priority of the CAA was the application of private-sector protections to congressional employees where those employees had little or no protection, the Board focused its recommendations in its first report on applying the private-sector laws not currently applicable to the legislative branch. The Board determined that, because of the CAA's focus on coverage of the Congress under private-sector laws, the Board's next priority should be to review the inapplicable provisions of the private-sector laws generally made applicable by the CAA.

The laws detailed in the other two tables were given a lower priority. Because determining whether and to what degree federal-sector provisions of law should be made applicable to the legislative branch "involve[s], in part, weighing the merits of the protections afforded by the CAA against those provided under other statutory schemes, the Board determined that, in . . . its first year of administering the CAA, [the Board determined that] it would be premature for the Board to make such comparative judgments."[17] Additionally, among the patchwork of federal-sector laws, which had come to cover some of the instrumentalities of the Congress, were laws the effectiveness and efficiency of which were then (and remain) under review by the Executive Branch. Similarly, the Board deferred consideration of laws that were not applicable, but where the Congress had applied a comparable provision, because the Board concluded that "as the Board gains rulemaking and adjudicatory experience in the application of the CAA to the legislative branch, the Board will be better situated to formulate recommendations about appropriate changes in those different statutory schemes."[18] In sum, the Board determined to follow the apparent priorities of the CAA itself, turning first to the application of currently inapplicable private-sector laws, and next in this, its second Section 102(b) Report, reviewing the omissions in coverage of the laws made applicable by the CAA and making recommendations for change.

Section 230 Study. At the same time as it completed its first report under section 102(b), the Board in its study mandated under section 230 of the CAA (the "Section 230

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[15] *Id.* at 3.

[16] *Id.*

[17] *Id.* at 4.

[18] *Id.*

Study")[19] analyzed the application of labor, employment and public access laws to GAO, GPO, and the Library, evaluating the statutory and regulatory regimes in place at these instrumentalities to determine whether they were "comprehensive and effective."[20] To do so, the Board had to establish a point of comparison, and determined that the CAA itself was the benchmark intended by Congress. Further, the Board gave content to the terms "comprehensive and effective," defining those terms according to the Board's statutory charge to examine the adequacy of "rights, protections, and procedures, including administrative and judicial relief."[21] Four categories were examined – substantive law; administrative processes and relief; judicial processes and relief; and substantive regulations – to determine whether the regimes at the instrumentalities were "comprehensive and effective" according to:

> (1) the nature of the substantive rights and protections afforded to employees, both as guaranteed by statute and as applied by rules and regulations; (2) the adequacy of administrative processes, including: *(a)* adequate enforcement mechanisms for monitoring compliance and detecting and correcting violations, and *(b)* a fair and independent mechanism for informally resolving or, if necessary, investigating, adjudicating, and appealing disputes; (3) the availability and adequacy of judicial processes and relief; and (4) the adequacy of any process for issuing substantive regulations specific to an instrumentality, including proposal and adoption by an independent regulatory authority under appropriate statutory criteria.[22]

The Board concluded that "overall, the rights, protections, procedures and [judicial and administrative] relief afforded to employees" were "comprehensive and effective when compared to those afforded to other legislative-branch employees under the CAA," but pointed out several gaps and a number of significant differences in coverage.[23] However, the Board explained that it was "premature" to make

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[19] SECTION 230 STUDY: STUDY OF LAWS, REGULATIONS, AND PROCEDURES AT THE GENERAL ACCOUNTING OFFICE, THE GOVERNMENT PRINTING OFFICE AND THE LIBRARY OF CONGRESS (DEC. 1996) at iii.

[20] 2 U.S.C. § 1371(c).

[21] *Id.*

[22] SECTION 230 STUDY at ii.

[23] *Id.*

recommendations at that "early stage of its administration of the Act,"[24] as to whether changes were necessary in the coverage applicable in these instrumentalities. The Board further stated that its ongoing reporting requirement under section 102(b) argued for accomplishing such statutory change on an incremental basis as the Board gained experience in the administration of the CAA. The conclusions in the Section 230 Study thus properly would serve at the appropriate time as "the foundation for recommendations for change" in a subsequent report under section 102(b) of the CAA.[25]

The time is now ripe for the Board to make recommendations for change in the coverage of the three instrumentalities which are appropriately included as part of this Report. The Board has had over three years' experience in the administration of the rights, protections and procedures made applicable to the legislative branch by the CAA. This experience in administering and enforcing the CAA and assessing its strengths and weaknesses in making recommendations respecting changes in the CAA to make the Act comprehensive and effective with respect to those parts of the legislative branch already covered under the CAA has augmented the structural foundation set down in the Section 230 Study. Thus, the Board has both the substantive and experiential bricks and mortar to model the options for changes in the regimes covering the three largest instrumentalities. Moreover, procedural rulemaking to extend the Procedural Rules of the Office of Compliance to cover proceedings commenced by GAO and Library employees alleging violations of sections 204-207 of the CAA raised questions as to the current status of substantive and procedural coverage of the instrumentalities under the Act, demonstrating an immediate need for Congress to clarify the relationship between the CAA and the instrumentalities.

Accordingly, this Report has three parts. In the first, the Board fulfills its general responsibility under section 102(b), by presenting a review of laws enacted after the 1996 Section 102(b) Report and recommendations as to which laws should be made applicable to the legislative branch. The second part analyzes which private-sector provisions of the CAA laws do not apply to the legislative branch and which should be made applicable. The third part reviews current coverage of GAO, GPO, and the Library of Congress under the laws made applicable by the CAA and presents the Board's recommendations for change.

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[24] *Id.*

[25] *Id.*

I. REVIEW OF LAWS ENACTED AFTER THE 1996 SECTION 102(b) REPORT, and REPORT RECOMMENDING THAT CERTAIN OTHER INAPPLICABLE LAWS SHOULD BE MADE APPLICABLE

A. Background

Section 102(b) of the CAA directs the Board of Directors of the Office of Compliance to –

> review provisions of Federal law (including regulations) relating to (A) the terms and conditions of employment (including hiring, promotion, demotion, termination, salary, wages, overtime compensation, benefits, work assignments or reassignments, grievance and disciplinary procedures, protection from discrimination in personnel actions, occupational health and safety, and family and medical and other leave) of employees, and (B) access to public services and accommodations.

And, on the basis of this review –

> Beginning on December 31,1996, and every 2 years thereafter, the Board shall report on (A) whether or to what degree the provisions described in paragraph (1) are applicable or inapplicable to the legislative branch, and (B) with respect to provisions inapplicable to the legislative branch, whether such provisions should be made applicable to the legislative branch.

In preparing this part of the 1998 Section 102(b) Report, all federal laws and amendments passed since October 1996 were reviewed to identify any new laws and changes in existing laws relating to terms and conditions of employment or access to public accommodations and services. The results of that review are reported here.[26] Further, in this part of the current Section 102(b) Report, the Board addresses the question of coverage of the legislative branch under the environmental whistleblower provisions which the Board deferred in the previous, 1996 Report. The Board also

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[26] As in the 1996 Section 102(b) Report, excluded from consideration were those laws that, although employment-related, (1) are specific to narrow or specialized industries or types of employment not found in the legislative branch (*e.g.*, employment in maritime or mining industries, or the armed forces, or employment in a project funded by federal grants or contracts); or (2) establish government programs of research, data-collection, advocacy, or training, but do not establish correlative rights and responsibilities for employees and employers (*e.g.*, statutes authorizing the Women's Bureau or the Bureau of Labor Statistics); or (3) authorize, but do not require, that employers provide benefits to employees, (*e.g.* so-called "cafeteria plans" authorized by 26 U.S.C. § 125).

notes that the provisions of private-sector law which the Board identified in that Section 102(b) Report as having little or no application in the legislative branch have not yet been made applicable, and the Board therefore also resubmits its recommendations regarding those provisions here. Based on experience in the administration and enforcement of the Act in the two year since that first report was submitted to Congress, the Board addresses two other areas – whistleblower protection and coverage of special study commissions – which, due to employee inquiry, the Board believes merit attention now.

B. Review and Report on Laws Passed Since October 1996

With two exceptions, the Congress did not pass a new law or significantly amend an existing law relating to terms and conditions of employment or access to public accommodations since the 1996 Section 102(b) Report. The first exception is the Postal Employees Safety Enhancement Act, Pub. L. No. 105-241, which amends the OSHAct to apply it to the United States Postal Service. The second exception is the Veterans Employment Opportunities Act of 1997 ("VEOA"), Pub. L. No. 105-339, which provides for expanded veteran's preference eligibility and retention in the executive branch and for those legislative-branch employees who are in the competitive service.

Both the OSHAct and the VEOA already apply to a substantial extent to the legislative branch. The OSHAct was made generally applicable to the legislative branch by section 215 of the CAA, and, in Parts II and III of this 1998 Section 102(b) Report, the Board has reviewed the extent to which specific provisions of the OSHAct apply within the legislative branch, and has made recommendations.

As to the VEOA, selected provisions of the Act apply to employees meeting the definition of "covered employee" under the CAA, excluding those employees whose appointment is made by a Member or Committee of Congress, and the VEOA assigns responsibility to the Board to implement veterans' preference requirements as to these employees. It is premature for the Board now, two months after enactment of the VEOA, to express any views about the extent to which veterans' preference rights do, or should, apply in the legislative branch, but the Board may decide to do so in a subsequent biennial report under section 102(b).

C. Report and Recommendations Respecting Laws Addressed in the 1996 Section 102(b) Report

1. Resubmission of Earlier Recommendations

The Board of Directors resubmits the following recommendations made in the 1996 Section 102(b) Report:

(a) Prohibition against discrimination on the basis of bankruptcy (11 U.S.C. § 525). Section 525(a) provides that "a governmental unit" may not deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under the bankruptcy statutes. This provision currently does not apply to the legislative branch. For the reasons stated in the 1996 Section 102(b) Report, the Board reports that the rights and protections against discrimination on this basis should be applied to employing offices within the legislative branch.

(b) Prohibition against discharge from employment by reason of garnishment (15 U.S.C. § 1674(a)). Section 1674(a) prohibits discharge of any employee because his or her earnings "have been subject to garnishment for any one indebtedness." This section is limited to private employers, so it currently has no application to the legislative branch. For the reason set forth in the 1996 Section 102(b) Report, the Board has determined that the rights and protections against discrimination on this basis should be applied to employing offices within the legislative branch.

(c) Prohibition against discrimination on the basis of jury duty (28 U.S.C. § 1875). Section 1875 provides that no employer shall discharge, threaten to discharge, intimidate, or coerce any permanent employee by reason of such employee's jury service, or the attendance or scheduled attendance in connection with such service, in any court of the United States. This section currently does not cover legislative-branch employment. For the reason set forth in the 1996 Section 102(b) Report, the Board has determined that the rights and protections against discrimination on this basis should be applied to employing offices within the legislative branch.

(d) Titles II and III of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000a to 2000a-6, 2000b to 2000b-3). These titles prohibit discrimination or segregation on the basis of race, color, religion, or national origin regarding the goods, services, facilities, privileges, advantages, and accommodations of "any place of public accommodation" as defined in the Act. Although the CAA incorporated the protections of titles II and III of the ADA, which prohibit discrimination on the basis of disability with respect to access to public services and accommodations, it does not extend protection against discrimination based upon race, color, religion, or national origin with respect to access to public services and accommodations. For the reasons set forth in the 1996 Section 102(b) Report, the Board has determined that the rights and protections afforded by titles II and III of the Civil Rights Act of 1964 against discrimination with respect to places of public accommodation should be applied to employing offices within the legislative branch.

2. Employee Protection Provisions of Environmental Statutes

(a) Report. The Board adds a recommendation respecting coverage under the employee protection provisions of the environmental protection statutes. The employee

protection provisions in the environmental protection statutes (15 U.S.C. § 2622; 33 U.S.C. § 1367; 42 U.S.C. §§ 300j–9(i), 5851, 6971, 7622, 9610) generally protect an employee from discrimination in employment because the employee commences proceedings under the applicable statutes, testifies in any such proceeding, or assists or participates in any way in such a proceeding or in any other action to carry out the purposes of the statutes. In the 1996 Report the Board reviewed and analyzed these provisions but "reserve[d] judgement on whether or not these provision should be made applicable to the legislative branch at this time" because, among other things, it was "unclear to what extent, if any, these provisions apply to entities in the legislative branch."[27]

Upon further review, applying the principles stated in the 1996 Report,[28] the Board has now concluded that there is sound reason to construe these provisions as applicable to the legislative branch. However, because it is possible to construe certain of these provisions as inapplicable, the Board recommends that Congress should adopt legislation clarifying that the employee protection provisions in the environmental protection statutes apply to all entities within the legislative branch.

(b) Recommendation: Legislation should be adopted clarifying that the employee protection provisions in the environmental protection statutes apply to all entities within the legislative branch.

D. Report and Recommendations in Areas Identified by Experience

1. Employee "Whistleblower" Protection

(a) Report. Civil service law[29] provides broad protection to "whistleblowers" in the executive branch and at GAO and GPO, but these provisions do not apply otherwise in the legislative branch. Employees subject to these provisions are generally protected against retaliation for having disclosed any information the employee reasonably believes evidences a violation of law or regulation, gross mismanagement or abuse of authority, or substantial danger to public health or safety. (In the private sector,

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[27] 1996 SECTION 102(b) REPORT at 6.

[28] The Board stated in the 1996 SECTION 102(b) REPORT: "The Board has generally followed the principle that coverage must be clearly and unambiguously stated." SECTION 102(b) REPORT at 2. Furthermore, as to private-sector provisions, the Board stated: "Because a major goal of the CAA was to achieve parity with the private sector, the Board has determined that, if our review reveals no impediment to applying the provision in question to the legislative branch, it should be made applicable." *Id*. at 4-5.

[29] *See, e.g.,* 5 U.S.C. § 2302(b)(8).

whistleblowers are also often protected by provisions of specific federal laws.[30]) The Office has received a number of inquiries from congressional employees concerned about protection against possible retaliation by an employing office for the disclosure of what the employee perceives to be such information. The absence of specific statutory protection such as that provided under 5 U.S.C. § 2302(b)(8) chills the disclosure of such information. Granting "whistleblower" protection could significantly improve the rights and protections afforded to legislative-branch employees in an area fundamental to the institutional integrity of the legislative branch.

(b) Recommendation: Congress should provide whistleblower protection to legislative-branch employees comparable to that provided to executive-branch employees under 5 U.S.C. § 2302(b)(8).

2. Coverage of Special-Purpose Study Commissions

(a) Report. The Office has been asked questions respecting the coverage of certain special-purpose study commissions that include members appointed by Congress or by officers of Congressional instrumentalities. Such commissions are not expressly listed in section 101(9) of the CAA in the definition of "employing offices" covered under the CAA, and in some cases it is unclear whether commission employees are covered under rights and protections comparable to those granted by the CAA. The Board believes that the coverage of such special-purpose study commissions should be clarified.

(b) Recommendation: Congress should specifically designate the coverage under employment, labor, and public access laws that it intends, both when it creates special-purpose study commissions that include members appointed by Congress or by legislative-branch officials, and for such commissions already in existence.

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[30] *See, e.g.,* 15 U.S.C. § 2622; 33 U.S.C. § 1367; 42 U.S.C. §§ 300j–9(i), 5851, 6971, 7622, 9610 (the employee protection provisions of various environmental statutes), discussed on page 13 above. Other whistleblower protection may be provided through state statute or state common law, which are outside the scope of this Report.

II. REVIEW OF INAPPLICABLE PRIVATE-SECTOR PROVISIONS OF CAA LAWS AND REPORT ON WHETHER THOSE PROVISIONS SHOULD BE MADE APPLICABLE

A. Background

In its first Section 102(b) Report,[31] the Board determined that it should, in future section 102(b) reports, proceed incrementally to review and report on currently inapplicable provisions of law, and recommend whether these provisions should be made applicable, as experience was gained in the administration and enforcement of the Act. The next report to Congress would be an "in depth study of the specific exceptions created by Congress"[32] from the nine private-sector laws made applicable by the CAA[33] because the application of these private-sector laws was the highest priority in enacting the CAA.[34]

Part II of this second Section 102(b) Report considers these specific exceptions,[35] focusing on enforcement, the area in which Congress made the most significant departures from the private-sector provisions of the CAA laws. In this part of the Report, the Board reviews the remedial schemes provided under the CAA with respect to the nine private-sector laws made applicable, evaluates their efficacy in light of three years of experience in the administration and enforcement of the Act, and compares these CAA remedial schemes with those authorities provided for the vindication of the CAA laws in the private sector.[36] Based on this review and analysis and the Board's statutory charge to recommend whether inapplicable provisions of law "should be made

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[31] *See* 1996 SECTION 102(b) REPORT.

[32] *Id*. at 4.

[33] The private-sector laws made applicable by the CAA are listed in note 10, at page 5, above.

[34] *See* 1996 SECTION 102(b) REPORT at 3.

[35] The table of significant provisions of the private-sector CAA laws not yet made applicable by the CAA, set forth in Appendix I to this Report, details these exceptions.

[36] The private-sector enforcement authority tables, set forth in Appendix II to this Report, summarize the enforcement authorities afforded to the implementing executive-branch agencies under the private-sector laws made applicable by the CAA in those areas in which the CAA does not already grant enforcement authority to the Office.

applicable to the legislative branch,"[37] the Board makes a number of recommendations respecting the application of these currently inapplicable enforcement provisions.

The statute provides no direct guidance to the Board in recommending whether a provision "should be made applicable."[38] The Board has therefore made these recommendations in light of its experience and expertise with respect to both the application of these laws to the private sector[39] and the administration and enforcement of the Act, as well as its understanding of the general purposes and goals of the Act. In particular, the Board intends that these recommendations should further a central goal of the CAA to create parity with the private sector so that employers and employees in the legislative branch would experience the same benefits and burdens as the rest of the nation's citizens.

B. Recommendations

The Board makes the following three specific recommendations of changes to the CAA respecting the application of these currently inapplicable enforcement provisions:[40]

1. **Grant the Office the authority to investigate and prosecute violations of § 207 of the CAA, which prohibits intimidation and reprisal.**

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[37] Section 102(b)(2)(B) of the CAA.

[38] Section 102(b) directs the Board to: "review provisions of Federal law (including regulations) relating to (A) the terms and conditions of employment (including hiring, promotion, demotion, termination, salary, wages, overtime compensation, benefits, work assignments or reassignments, grievance and disciplinary procedures, protection from discrimination in personnel actions, occupational health and safety, and family and medical and other leave) of employees, and (B) access to public services and accommodations." On the basis of this review, section 102(b) requires the Board biennially to: "report on (A) whether or to what degree the provisions described in paragraph (1) are applicable or inapplicable to the legislative branch, and (B) with respect to provisions inapplicable to the legislative branch, whether such provisions should be made applicable to the legislative branch."

[39] Section 301(d)(1) of the CAA requires that "[m]embers of the Board shall have training or experience in the application of the rights, protections, and remedies under one or more of the laws made applicable by [the CAA]."

[40] The Board also notes that several problems have been encountered in the enforcement of settlements requiring on-going or prospective action by a party. The Board does not, at this time, recommend legislative change because the Executive Director, as part of her plenary authority to approve settlements, can require a self-enforcing provision in certain cases and will now do so, as appropriate.

The Board recommends that the Office should be granted enforcement authority with respect to section 207 of the CAA because of the strong institutional interest in protecting employees against intimidation or reprisal for the exercise of the rights provided by the CAA or for participation in the CAA's processes. Investigation and prosecution by the Office would more effectively vindicate those rights, dispel the chilling effect that intimidation and reprisal create, and protect the integrity of the Act and its processes.

As the tables indicate, enforcement authority with respect to intimidation or reprisal is provided to the agencies that administer and enforce the CAA laws in the private sector.[41] In contrast, under the CAA, the rights and protections provided by section 207 are vindicated only if the employee, after counseling and mediation, pursues his or her claim before a hearing officer or in district court. Experience in the administration and enforcement of the CAA argues that the Office should be granted comparable authority to that exercised by the executive-branch agencies that implement the CAA laws in the private sector. Covered employees who have sought information from the Office respecting their substantive rights under the Act and the processes available for vindicating these rights have expressed concern about their exposure in coming forward to bring a claim, as well as a reluctance and an inability to shoulder the entire litigation burden without the support of agency investigation or prosecution. Moreover, employees who have already brought their original dispute to the counseling and mediation processes of the Office and then perceive a reprisal for that action may be more reluctant to use once again the very processes that led to the claimed reprisal.

Whatever the reasons a particular employee does not bring a claim of intimidation or reprisal, such unresolved claims threaten to undermine the efficacy of the CAA. Particularly detrimental is the chilling effect on other employees who may wish to bring a claim or who are potential witnesses in other actions under the CAA. Without effective enforcement against intimidation and reprisal, the promise of the CAA that "congressional employees will have the civil rights and social legislation that ensure fair treatment of workers in the private sector"[42] is rendered illusory.

Therefore, in order to preserve confidence in the Act and to avoid chilling legislative branch-employees from exercising their rights or supporting others who do, the Board has concluded that the Congress should grant the Office the authority to investigate and prosecute allegations of intimidation or reprisal as they would be investigated and prosecuted in the private sector by the implementing agency. Enforcement authority can be exercised in harmony with the alternative dispute resolution process and the private right of action provided by the CAA, and will further the purposes of section 207 of the Act.

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[41] The only exception is the WARN Act, which has no enforcement authorities.

[42] 141 CONG. REC. S441 (daily ed. Jan. 9, 1995) (statement of Senator Grassley).

2. Clarify that § 215(b) of the CAA, which makes applicable the remedies set forth in § 13(a) of the OSHAct, gives the General Counsel the authority to seek a restraining order in district court in case of imminent danger to health or safety.

With respect to the substantive provisions for which the Office already has enforcement authority,[43] the Board's experience to date has illuminated a need to revisit only one area, section 215(b) of the CAA which provides the remedy for a violation of the substantive provisions of the OSHAct made applicable by the CAA.[44] Under section 215(b) the remedy for a violation of the CAA shall be a corrective order, "including such order as would be appropriate if issued under section 13(a)" of the OSHAct. Among other things, the OSHAct authorizes the Secretary of Labor to seek a temporary restraining order in district court in the case of imminent danger. The General Counsel of the Office of Compliance, who enforces the OSHAct provisions as made applicable by the CAA, takes the position that section 213(b), by its terms, gives him the same standing to petition the district court for a temporary restraining order in a case of imminent danger as the Labor Department has under the OSHAct. However, it has been suggested that the language of section 213(b) does not clearly provide that authority.

Although it has not yet proven necessary to resolve a case of imminent danger by means of court order because compliance with the provisions of section 5 of the OSHAct has been achieved through other means,[45] the express authority to seek preliminary injunctive relief is essential to the Office's ability promptly to eliminate all potential workplace hazards. If it should become necessary to prosecute a case of imminent danger by means of district court order, action must be swift and sure. Therefore, the Board recommends that the CAA be amended to clarify that the General Counsel has the standing to seek a temporary restraining order in federal district court and that the court has jurisdiction to issue the order.

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[43] The CAA provides enforcement authority with respect to two private-sector laws, the OSHAct and the provisions of the ADA relating to public services and accommodations. The CAA adopts much of the enforcement scheme provided under the OSHAct; it creates an enforcement scheme with respect to the ADA which is analogous to that provided under the private-sector provisions but is *sui generis*.

[44] Section 215(b) of the CAA reads as follows: "Remedy.–The remedy for a violation of subsection (a) shall be an order to correct the violation, including such order as would be appropriate if issued under section 13(a) of the Occupational Safety and Health Act of 1970 (29 U.S.C. § 662(a))."

[45] *See generally* GENERAL COUNSEL OF THE OFFICE OF COMPLIANCE, REPORT ON SAFETY & HEALTH INSPECTIONS CONDUCTED UNDER THE CONGRESSIONAL ACCOUNTABILITY ACT (Nov. 1998).

3. Make applicable the record-keeping and notice-posting requirements of the private-sector CAA laws.

Experience in the administration of the Act leads the Board to recommend that all currently inapplicable record-keeping and notice-posting provisions be made applicable under the CAA. The Board recommends that the Office be granted the authority to require that records be kept and notices posted in the same manner as required by the agencies that enforce the provisions of law made applicable by the CAA in the private sector.

As the tables illustrate,[46] most of the laws made generally applicable by the CAA authorize the enforcing agency to require the keeping of pertinent records and the posting of notices in the work place. Experience has demonstrated that where employing offices have voluntarily kept records, these records have greatly assisted in the speedy resolution of disputed matters. Especially where the law has not been violated, employing offices can more readily demonstrate compliance if adequate records have been made and preserved. Moreover, based upon its experience and expertise, the Board has concluded that effective record keeping is not only beneficial to the employer, but in many cases is necessary to the effective vindication of the rights of employees.

Additionally, living with the same record-keeping and notice-posting requirements as apply in the private sector will give Congress the practical knowledge of the costs and benefits of these requirements. Congress will be able to determine experientially whether the benefits of each record-keeping and notice-posting requirement outweigh the burdens. Application of the record-keeping and notice-posting requirements will thus achieve one of the primary goals of the CAA, that the legislative branch live under the same laws as the rest of the nation's citizens.

In addition to these specific recommendations, the Board makes the following two general recommendations which derive from the comparison between the CAA's remedial schemes and those authorities provided for the administration and enforcement of the CAA laws in the private sector:

4. Extend the benefits of the model alternative dispute resolution system created by the CAA to the private and the federal sectors.

The CAA largely replaces the enforcement schemes used to administer and enforce the CAA laws in the private sector with a model alternative dispute resolution system that mandates counseling and mediation prior to pursuing a claim before a hearing officer or in district court. Experience with this system has shown that most

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[46] *See generally* the tables of enforcement authorities set forth in Appendix II to this Report.

disputes under the CAA are resolved by means of counseling and mediation. There are substantial advantages in resolving disputes in their earliest stages, before litigation. Positions have not hardened; liability, if any, is generally at a minimum; and the maintenance of amicable workplace relations is most likely. Therefore, the Board recommends that Congress extend the alternative dispute resolution system created by the CAA to the private and federal sectors so that these sectors will have parity with the Congress in the use of this effective and efficient method of resolving disputes. The Board believes that the use of this alternative dispute resolution system can be harmonized with the administrative and enforcement regimes in place in both the federal and private sectors.

5. Grant the Office the other enforcement authorities exercised by the agencies that implement the CAA laws for the private sector.

To further the goal of parity, the Board also recommends that Congress grant the Office the remaining enforcement authorities that executive-branch agencies utilize to administer and enforce the provisions of law made applicable by the CAA in the private sector. As the tables show, the implementing agencies have investigatory and prosecutorial authorities with respect to all of the private-sector CAA laws, except the WARN Act.[47] Based on the experience and expertise of Members of the Board, granting the Office the same enforcement authorities as the agencies that administer and enforce these substantive provisions in the private sector would make the CAA more comprehensive and effective. The Office can harmonize the exercise of investigatory and prosecutorial authorities with the use of the model alternative dispute resolution system that the CAA creates. By taking these steps to live under full agency enforcement authority, the Congress will strengthen the bond that the CAA created between the legislator and the legislated: "This has always been deemed one of the strongest bonds by which human policy can connect the rulers and the people together. It creates between them that communion of interests . . . without which every government degenerates into tyranny."[48]

C. Conclusion

The biennial reporting requirement of section 102(b) provides the opportunity for Congress to review the comprehensiveness and effectiveness of the CAA in light of the Board's recommendations and make the legislative changes it deems necessary. The CAA was enacted in the spirit of "the framers of our constitution" to take "care to

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[47] The particular authorities afforded to the implementing executive-branch agencies under the private-sector laws made applicable by the CAA are summarized in the private-sector enforcement authority tables set forth in Appendix II to this Report.

[48] THE FEDERALIST NO. 57, at 42 (James Madison) (Franklin Library ed., 1984).

provide that the laws shall bind equally on all, especially those who make them."[49] Acknowledging that reaching that goal was to be a continuing process, section 102(b) mandated the periodic process of re-examination of which this Report and its recommendations are a part.

The CAA took a giant step toward achieving parity and providing comprehensive and effective coverage of the legislative branch by applying certain substantive provisions of law and by providing new administrative and judicial remedies. However, the Board's review of all the currently inapplicable provisions of the CAA laws, as set forth in the accompanying table,[50] has demonstrated that significant gaps remain in the laws made applicable, particularly with respect to the manner in which these laws are enforced under the CAA as compared with the private sector. Based on its expertise in the application of the CAA laws, its three years of experience in the administration and enforcement of the Act, and its understanding that the general purposes and goals of the Act were to achieve parity in the application of laws and to provide the legislative branch with comprehensive and effective protections, the Board recommends that Congress now take the steps of implementing the legislative changes discussed above. The Board further advises the Congress that to realize fully the goals of the CAA – to assure that "congressional employees will have the civil rights and social legislation that ensure fair treatment of workers in the private sector" and "to ensure that members of Congress will know firsthand the burdens that the private sector lives with"[51] – all inapplicable provisions of the CAA laws should, over time, be made applicable.

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[49] THOMAS JEFFERSON, *A Manual of Parliamentary Practice: for the Use of the Senate of the United States*, *in* JEFFERSON'S PARLIAMENTARY WRITINGS 359 (Wilbur S. Howell ed., 1988) (2d ed. 1812).

[50] *See* table of the significant provisions of the CAA laws not yet made applicable by the CAA, set forth as Appendix I to this Report.

[51] 141 CONG. REC. S441 (daily ed. Jan. 9, 1995) (statement of Senator Grassley).

III. LEGISLATIVE OPTIONS AND RECOMMENDATIONS ON THE APPLICATION OF LAWS TO GAO, GPO, AND THE LIBRARY OF CONGRESS

A. Background

Congress sought "to bring order to the chaos of the way the relevant laws apply to congressional instrumentalities"[52] when, in enacting the CAA, it applied the CAA to the smaller instrumentalities, but not to GAO, GPO, and the Library. Instead, the CAA clarified and extended existing coverage of the three largest instrumentalities in certain respects[53] and, in section 230, required the Board to conduct a study evaluating whether the "rights, protections, and procedures, including administrative and judicial relief" now in place at these instrumentalities were "comprehensive and effective" and to make "recommendations for any improvements in regulations or legislation."[54]

The legislative history explains why Congress covered some instrumentalities under the CAA but not others. Applying the CAA to the smaller instrumentalities and their employees would –

> extend to these employees, for the first time, the right to bargain collectively, and it will provide a means of enforcing compliance with these laws [made applicable by the CAA] that is independent from the management of these instrumentalities. . . . [B]y strengthening the enforcement mechanisms, the [CAA] attempts to transform the patchwork

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[52] 141 CONG. REC. S445 (daily ed. Jan. 9, 1995) (statement of Senator Grassley).

[53] The CAA – *(i)* affirmed that GAO and GPO are covered under Title VII and the ADEA and extended coverage under those laws to additional employees at GPO; *(ii)* established new procedures for enforcing existing ADA rights at GAO, GPO, and the Library; *(iii)* removed GAO and the Library from coverage under FMLA provisions generally applicable in the federal sector and placed those instrumentalities under FMLA provisions generally applicable in the private sector; and *(iv)* affirmed that GPO is covered under the FLSA and extended coverage under that law to additional employees at GPO. *See* §§ 201(c), 202(c), 203(d), 210(g) of the CAA.

[54] Originally, the Administrative Conference of the United States was charged with conducting the study and making recommendations for improvements in the laws and regulations governing the three instrumentalities, but when Congress ceased funding the Conference, Congress also transferred its responsibility for the Study to the Board.

> of hortatory promises of coverage into a truly enforceable application of these laws.[55]

By contrast, GAO, GPO, and the Library –

> already have coverage and enforcement systems that are identical or closely analogous to the executive-branch agencies.
>
> Notably, employees in each of these agencies already have the right to seek relief in the Federal courts for violations of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Fair Labor Standards Act, and they are covered under the same provisions of the Family and Medical Leave Act as executive-branch employees.
>
> Employees in each of these instrumentalities also already are assured of the right to bargain collectively, with a credible enforcement mechanism to protect that right. For these three instrumentalities, [the CAA] clarifies existing coverage in certain respects, and expands coverage under the Americans with Disabilities Act.[56]

Furthermore, legislative history explained that extending the CAA to cover the smaller instrumentalities would have the advantage of "using the apparatus that will already be necessary to apply these [CAA] laws to the 20,000 employees of the House and Senate [to also apply these laws] to the remaining approximately 3,000 employees of the Architect [of the Capitol]" and other smaller instrumentalities.[57] On other hand, the CAA would "reduce the adjudicatory burden on the new office by excluding from its jurisdiction the approximately 15,000 employees of GAO, GPO and the Library of Congress."[58]

On December 30, 1996, the Board transmitted its study mandated by section 230 of the CAA to Congress. This Section 230 Study explained that, to fulfill the statutory mandate to assess whether the "rights, protections, and procedures, including administrative and judicial relief,"[59] at GAO, GPO, and the Library were "comprehensive and effective," the Board first had to establish a point of comparison, and the Board decided that the CAA itself was the appropriate benchmark. To give further content to

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[55] 141 CONG. REC. S445 (daily ed. Jan. 9, 1995) (statement of Senator Grassley).

[56] *Id.*

[57] *Id.*

[58] *Id.*

[59] § 230(c) of the CAA.

the term "comprehensive and effective," the Board identified four "key aspects of the current statutory and regulatory regimes,"[60] which the Board reviewed in evaluating the comprehensiveness and effectiveness of the rights, protections, and procedures at the three instrumentalities:

> (1) the nature of the substantive rights and protections afforded to employees, both as guaranteed by statute and as applied by rules and regulations;
>
> (2) the adequacy of administrative processes, including: (a) adequate enforcement mechanisms for monitoring compliance and detecting and correcting violations, and (b) a fair and independent mechanism for informally resolving or, if necessary, investigating, adjudicating, and appealing disputes;
>
> (3) the availability and adequacy of judicial processes and relief; and
>
> (4) the adequacy of any process for issuing substantive regulations specific to an instrumentality, including proposal and adoption by an independent regulatory authority under appropriate statutory criteria.[61]

After reviewing and analyzing the statutory and regulatory regimes in place at the three instrumentalities, the Board concluded that –

> overall, the rights, protections, procedures and relief afforded to employees at the GAO, the GPO and the Library under the twelve laws listed in section 230(b) are, in general, comprehensive and effective when compared to those afforded other legislative branch employees covered under the CAA.[62]

However, the Board also found –

> The rights, protections, procedures and relief applicable to the three instrumentalities are different in some respects from those afforded under the CAA, in part because employment at the instrumentalities is governed either directly under civil service statutes and regulations or under laws and regulations modeled on civil service law.[63]

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[60] SECTION 230 STUDY at ii.

[61] *Id.*

[62] *Id.*

[63] *Id.*

These civil-service provisions, which apply generally in the federal sector, apply at the three instrumentalities subject to numerous exceptions. In some instances where federal-sector provisions do not apply, these instrumentalities are covered under the CAA, and, in a few instances, under the statutory provisions that apply generally in the private sector. The result is what the Board called a "patchwork of coverages and exemptions."[64]

However, the Board decided that it would be "premature" at that "early stage of its administration of the Act"[65] to make recommendations as to whether changes were necessary in the statutory and regulatory regimes applicable in these instrumentalities.[66] The ongoing nature of its reporting requirement under section 102(b) argued for making recommendations for statutory change on an incremental basis as the Board gained experience in the administration of the CAA, and the conclusions in the Section 230 Study would serve at the appropriate time as "the foundation for recommendations for change" in a subsequent report under section 102(b) of the CAA.[67]

Pursuant to the CAA, several of its provisions became effective with respect to GAO and the Library on December 30, 1997, which was one year after the Section 230 Study was transmitted to Congress.[68] On October 1, 1997, in anticipation of the December 30 effective date, the Office of Compliance published a notice proposing to extend its Procedural Rules to cover claims alleging that GAO or the Library violated applicable CAA requirements.[69] Comments in response to this notice, and to a supplemental notice published on January 28, 1998,[70] raised questions as to whether the CAA authorizes GAO and Library employees to use the procedures established by the Act to

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64 *Id*. at iv.

65 *Id.*

66 The Board's institutional role, functions, and resources were also very different from those of the Administrative Conference, to which Congress originally assigned the task of preparing the study under section 230. *See* footnote 54 at page 23, above. The Conference in performing the study and making recommendations would have been acting in accordance with its institutional mandate to study administrative agencies and make recommendations for improvements in their procedures.

67 SECTION 230 STUDY at iii.

68 *See* §§ 204(d)(2), 205(d)(2), 206(d)(2), 215(g)(2) of the CAA.

69 143 CONG. REC. S10291 (daily ed. Oct. 1, 1997) (Notice of Proposed Rulemaking).

70 144 CONG. REC. S86 (daily ed. Jan. 28, 1998) (Supplementary Notice of Proposed Rulemaking).

seek remedies for alleged violations of sections 204-207 of the Act. (These sections apply the EPPA, WARN Act, and USERRA and prohibit retaliation for asserting CAA rights.) The Office decided to terminate the rulemaking and, instead, "to recommend that the Office's Board of Directors prepare and submit to Congress legislative proposals to resolve questions raised by the comments."[71]

The Board has decided that this Section 102(b) Report, focusing on omissions in coverage of the legislative branch under the laws made generally applicable by the CAA, provides the appropriate time and place to make recommendations regarding coverage of GAO, GPO, and the Library under those laws. As anticipated in the Section 230 Study, enough experience has now been gained in implementing the CAA to enable the Board to make recommendations for improvements in legislation applicable to these instrumentalities. Moreover, resolution of uncertainty as to whether employees alleging violations of sections 204-207 may use CAA procedures is an additional reason to include in this Report recommendations about coverage of the three instrumentalities.

B. Principal Options for Coverage of the Three Instrumentalities

On the basis of the findings and analysis in the Section 230 Study, the Board has identified three principal options for coverage of these instrumentalities:

C (1) CAA Option – Coverage under the CAA, including the authority of the Office of Compliance as it administers and enforces the CAA. (The Board here takes as its model the CAA as it would be modified by enactment of the recommendations made in Part II of this Report.)

C (2) Federal-Sector Option – Coverage under the statutory and regulatory regime that applies generally in the federal sector, including the authority of executive-branch agencies as they administer and enforce the laws in the federal sector.

C (3) Private-Sector Option – Coverage under the statutory and regulatory regimes that apply generally in the private sector, including the authority of the executive-branch agencies as they administer and enforce the laws in the private sector.[72]

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[71] 144 CONG. REC. S4818, S4819 (daily ed. May 13, 1998) (Notice of Decision to Terminate Rulemaking).

[72] To be sure, other, hybrid models could be developed, based on normative judgments respecting particular provisions of law. Or, it would be possible to leave the "patchwork" of coverages and exemptions currently in place at the three instrumentalities and fill serious gaps in coverage on a piecemeal basis. However, presentation of such models would cloud the central question of which is the most

(continued...)

These options are compared with the current regimes at GAO, GPO, and the Library, identifying the significant effects of applying each option.

The comparisons are presented in tables set forth in Appendix III to this Report and are summarized and discussed in narrative form below. Insofar as federal-sector employers, private-sector employers, or the three instrumentalities are covered by laws affording substantive rights that have no analogue in the CAA, this Report does not discuss or chart these rights.[73] In defining the coverage described in the three options, the Board decided that, so as not to create duplicative rights and remedies, the application of the CAA or of analogous federal-sector or private-sector provisions should supersede existing provisions affording substantially similar substantive rights or establishing administrative, judicial, or rulemaking processes to implement, remedy, or enforce such rights. However, substantive rights under federal-sector or other laws having no analogue in the CAA, and processes used to implement, remedy, or enforce such rights, would not be affected by the coverage described in the three options.

In comparing each option for coverage with the regime in place at each instrumentality, the Board has analyzed the differences under the four general categories used in the Section 230 Study: Substantive Rights, Administrative Remedial and Enforcement Processes, Judicial Processes and Relief, and Substantive Rulemaking Process. The narrative comparisons highlight the main differences in each area. The appended tables make a more detailed comparison of differences between each option and the existing regimes at the instrumentalities in each of the above-defined areas.

The examination of the consequences of applying the three options demonstrates that each has advantages and disadvantages with regard to "comprehensiveness" and

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[72] (...continued)
appropriate model for the instrumentalities.

[73] In evaluating these options, the Board is not considering the veterans' preference statutory provisions that apply generally in the federal sector and that, under the Veterans Employment Opportunity Act of 1998 ("VEOA"), were recently made applicable to certain employing offices of the legislative branch. Veterans' preference requirements, which were not made applicable by the CAA as enacted in 1995 or listed for study under section 230, were not analyzed in the Board's study under that section. Enacted on October 31, 1998, the VEOA assigned responsibility to the Board to implement veterans' preference requirements as to certain employing offices. It is premature for the Board now to express any views about the extent to which veterans' preference rights do, or should, apply to GAO, GPO, and the Library, but the Board may decide to do so in a subsequent biennial report under section 102(b).

"effectiveness," particularly in the area of administrative processes and enforcement. A particular administrative/enforcement scheme arguably may be more "comprehensive" than another because it includes more avenues for the redress of grievances, but the very multiplicity of avenues arguably may make that scheme less "effective" than a more streamlined system. Because all three options largely provide the same substantive rights, determining whether to advocate the option of applying the CAA, the federal-sector model, or the private-sector model depends largely on weighing the costs and benefits of administrative systems for resolving disputes either primarily through a single-agency alternative dispute resolution system, an internal-agency investigation and multi-agency adjudicatory system, or a multi-agency investigation and enforcement system.

The Board found that the question of which option to recommend is by no means simple. Sensible arguments support the application of each model. GAO, GPO, and the Library can be analogized to either the other employing offices in the legislative branch, of which these instrumentalities are by statute a part, the executive branch, to which GAO, GPO, and the Library have many functional similarities, or the private sector, which the legislative history of the CAA portrays as the intended workplace model for the legislative branch.

Arguably, the legislative-branch model of the CAA, administered and enforced by the Office of Compliance, is the most appropriate to the instrumentalities, in that Congress has already placed not only the employing offices of the House and Senate, but also the instrumentalities of the Office of the Architect of the Capitol, the Capitol Police, the Congressional Budget Office, and the Office of Compliance under the CAA. Furthermore, as the legislative history of the CAA makes clear, the authors of the Act expected the Board to use the CAA as the benchmark in evaluating the comprehensiveness and effectiveness of the regimes in place at GAO, GPO, and the Library. Moreover, GAO, GPO, and the Library are considered instrumentalities of the Congress for many purposes, and some offices of these instrumentalities work directly with Members and staff of Congress in the legislative process, which legislative functions some Members of Congress perceived as creating tension with executive-branch agency coverage.

On the other hand, federal-sector laws and regulations, administered and enforced in part by executive-branch agencies, are already in place at the three instrumentalities in many respects. In addition, the special circumstances attendant to Congressional offices that warranted administration and enforcement under the CAA by a separate legislative-branch office, and that justified certain limitations on rights and procedures under the CAA as compared to those generally available in the federal sector, are attenuated when applied to GAO, GPO, and the Library. Moreover, as noted in Part II above, the Board has advised that the Congress over time should make all currently inapplicable provisions of the federal- and private-sector CAA laws applicable to itself; thus the instrumentalities should not become subject to those exemptions from coverage attendant upon application of the CAA model.

Finally, the private-sector model arguably best serves the goal of the CAA of achieving parity with the private sector whenever possible. By so doing, those in the legislative branch would live under the same legal regime as the private citizen.

C. Comparison of the Options for Change

1. CAA Option: Bring the three instrumentalities fully under the CAA, including the authority of the Office of Compliance as it administers and enforces the Act.

(a) Substantive rights. Covering GAO, GPO, and the Library under the CAA would grant substantive rights that are generally the same as those now applicable at these instrumentalities. However, changes include: *(i)* GPO would become covered under the rights of the WARN Act and EPPA, which do not now apply at that instrumentality. *(ii)* Coverage under the CAA would afford a greater scope of appropriate bargaining units and collective bargaining than is now established at GAO under regulations issued by the Comptroller General under the GAO Personnel Act. *(iii)* Coverage under section 220(e)(2)(H) of the CAA would add a process by which the Board, with the approval of the House and Senate, can remove an office from coverage under labor-management provisions if exclusion is required because of conflict of interest or Congress's constitutional responsibilities; no such process applies now at the three instrumentalities. *(iv)* The CAA, applying private-sector FMLA rights, authorizes the employing office to recoup health insurance costs from a covered employee who does not return to work, to decline to restore "key" employees who take FMLA leave, and to elect whether an employee must use available paid annual or sick leave before taking leave without pay; GAO and the Library have already been granted these authorities, but coverage under the CAA would extend these authorities to GPO. *(v)* CAA provisions that apply FLSA rights would eliminate most use of compensatory time off, "credit hours," and compressed work schedules that may now be used at the three instrumentalities in lieu of FLSA overtime pay.

(b) Administrative and enforcement processes. In the Section 230 Study, the Board found that the three instrumentalities are subject to –

> a patchwork of coverages and exemptions . . . . The procedural regimes at the instrumentalities differ from one another, are different from the CAA and are different from that in the executive branch. . . . [T]he multiplicity of regulatory schemes means that, in some cases, employees have more procedural options available, and in some cases, fewer. Additional procedural steps may afford opportunities to employees in some cases, but may also be more time-consuming and inefficient.[74]

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[74] SECTION 230 STUDY at iv.

In a number of respects, coverage under the CAA would grant employees for the first time an avenue to have their claims resolved by an administrative entity outside of the employing instrumentality. Under present law, while employees of all the instrumentalities may seek a remedy for unlawful discrimination in federal district court, there are limitations on the administrative remedies available outside of their employing agency. At the Library, an employee alleging discrimination may pursue a complaint through internal Library procedures, but if the Librarian denies the complaint, the employee has no right of appeal to an outside administrative agency. Likewise, a GPO employee cannot appeal administratively from the Public Printer's decision on a complaint of discrimination on the basis of disability. The GAO Personnel Appeals Board ("PAB"), which hears GAO employee appeals, is administratively part of GAO, and its Members are appointed by the Comptroller General.

In the area of occupational safety and health, the CAA requires the General Counsel of the Office of Compliance to conduct inspections periodically and in response to charges and authorizes the prosecution of violations. Although these CAA provisions already cover GAO and the Library, they do not now cover GPO, where no outside agency has authority to inspect or prosecute occupational safety and health violations.

The application of the CAA would end the patchwork of administrative coverages and exemptions and extend an administrative mechanism for resolving complaints that is administered by an office independent of the employing instrumentalities. The counseling and mediation system of the Office provides a fair, swift, and independent mechanism for informally resolving disputes. The complaint and appeals process (along with the option of pursuing a civil action) provides an impartial method of adjudicating and appealing those disputes that cannot be resolved informally.

On the other hand, except in the areas of safety and health, labor-management, and public access, the investigatory and enforcement authorities now applicable at the three instrumentalities are more extensive than those under the CAA, especially without the authorities that the Board recommends should be added to the CAA in Part II of this Report. For example, internal procedures at the three instrumentalities provide for investigation of every discrimination complaint by the equal employment office of the employing agency and the results of those investigations are made available to the employee. Under the CAA, there is no agency investigation, and an employer is not required to disclose the results of any internal investigation to the employee. Applying the CAA to the three instrumentalities would not preclude continuing to make their internal administrative and investigative procedures available for employees who choose to use them, but employees might have to choose whether to forgo using the internal procedures and investigations in order to meet the time limits for administrative or judicial claims resolution under the CAA.

Furthermore, the PAB General Counsel for GAO and the Special Counsel for GPO provide for prosecution of discrimination and other violations under certain

circumstances. The CAA does not now provide for prosecution of discrimination or most other kinds of violations.

The Board also observes that the three instrumentalities are now covered under federal-sector provisions of Title VII and the ADEA that require equal employment opportunity programs and affirmative employment plans, and that GAO's programs and plans are reviewed by the PAB and GPO's programs and plans are reviewed by the Equal Employment Opportunity Commission ("EEOC"). The CAA contains no comparable provisions.

(c) Judicial processes and relief. Coverage under the CAA would grant a private right of action that is not now available to GPO employees to remedy FMLA and USERRA violations and would clarify that GAO and Library employees may use CAA judicial procedures to remedy EPPA, WARN Act, and USERRA violations. The CAA would also grant the right to a jury trial in all situations where it would be available in the private sector, whereas a jury trial may not be available now at the three instrumentalities in actions under the ADEA, FMLA, or FLSA.

On the other hand, while the right to judicial appeal to the Federal Circuit is largely the same under the CAA as it is under the provisions of labor-management law currently applicable at the three instrumentalities, the CAA does not allow the charging party to take appeals from unfair labor practice decisions and does not provide for appeal of arbitral awards involving adverse actions or performance-based actions.

(d) Substantive Rulemaking Process. GAO and the Library are already subject to substantive regulations promulgated by the Board under CAA provisions applying rights under the EPPA, WARN Act, and OSHAct, and the full application of CAA coverage would also subject these two instrumentalities to the Board's regulations implementing FLSA, FMLA, Chapter 71, and ADA public access rights, and would subject GPO to all substantive regulations under the CAA. Substantive regulations are issued under section 304 of the CAA, which authorizes the Board to issue regulations subject to approval by the House and Senate. These regulations under the CAA must generally be the same as those adopted by executive-branch agencies under the laws made applicable by the CAA for the private sector (or, under Chapter 71, for the federal sector), or, if regulations are not adopted by the Office and approved by the House and Senate, those executive-branch agency regulations themselves are applied under the CAA in most instances.[75] The regulatory requirements made applicable by the CAA are

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[75] To date, regulations have been adopted and submitted to the House and Senate but not approved in the following areas: OSHAct, public access under the ADA, application of labor-management rights to offices listed in § 220(e) of the CAA, and coverage of GAO and the Library under substantive regulations with respect to EPPA, WARN Act, and OSHAct. Regulations adopted by executive-branch

(continued...)

therefore established by regulatory agencies independent of the employers being regulated.

Currently, for the subject areas where the three instrumentalities are not now subject to CAA regulations, the substantive rights of employees at the three instrumentalities are defined in most respects by government-wide regulations adopted by executive-branch agencies. However, in a few areas, the heads of these instrumentalities are granted the authority to define and delimit rights for their employees by regulation. For example, the GAO Personnel Act authorizes the Comptroller General to establish a labor-management program "consistent" with Chapter 71, and GAO's order under this authority includes limits on appropriate bargaining units and on the scope of bargaining that are more restrictive than those in Chapter 71, as made applicable by the CAA. The Comptroller General and the Librarian of Congress have authority to promulgate substantive regulations under the FMLA. The Public Printer is not bound to apply the Labor Department's occupational safety and health standards, provided he provides conditions "consistent with" those standards. By contrast, if the CAA applied, these instrumentalities would become subject to regulatory requirements established by regulatory agencies independent of the instrumentalities.

2. <u>Federal-Sector Option</u>: Bring the three instrumentalities fully under federal-sector provisions of law, including the authority of executive-branch agencies as they administer and enforce those provisions.

(a) Substantive rights. The substantive rights now available at the three instrumentalities are mostly the same as those that would become available under federal-sector coverage. However, some changes would occur. For instance, *(i)* Under the federal-sector regime, GAO and the Library would no longer be covered under CAA provisions making applicable the rights under the EPPA or WARN Act. *(ii)* GAO and the Library would have coverage under the federal-sector provisions of the FMLA, which do not allow the employer to recoup health insurance costs from an employee who does not return to work; or to limit the application of FMLA restoration rights to "key" employees; or to elect whether an employee must use available paid annual or sick leave before taking leave without pay. *(iii)* Coverage under Chapter 71 would afford a greater scope of appropriate bargaining units and collective bargaining than is now provided at GAO under regulations issued by the Comptroller General under the GAO Personnel Act.

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[75] (...continued)
agencies therefore apply in all of these areas except § 220(e), because § 411 of the CAA excepts from the default provision regulations regarding the offices listed under § 220(e)(2). If the CAA covered the three instrumentalities, § 220(e) could affect them only if the Board adopted regulations, approved by the House and Senate, to exclude "such other offices that perform comparable functions," within the meaning of § 220(e)(2)(H).

(b) Administrative and enforcement processes. The administrative processes now in place at GAO, GPO, and the Library are similar to, and, in many instances, the same as, those in effect generally for the federal sector. Of the three, GPO has the most federal-sector coverage, being already subject, in most areas, to the authority of the EEOC, Merit Systems Protection Board ("MSPB"), and Special Counsel, which investigate, bring enforcement actions, and hear appeals arising out of executive-branch agencies, and the Office of Personnel Management ("OPM"), which promulgates government-wide regulations under the FLSA and FMLA and investigates and resolves FLSA complaints. Choosing the federal-sector option at GPO would extend this existing situation across the board. Furthermore, whereas GPO employees' ADA complaints are now investigated and resolved by GPO management without any right of appeal to, or investigation and prosecution by, any outside agency or office, federal-sector coverage would bring such complaints under the authority of executive-branch agencies. Also, regarding occupational safety and health at GPO, whereas no outside agency can now conduct inspections, consider employee complaints, require compliance, or resolve disputes regarding occupational safety and health, application of federal-sector coverage would cause these functions to be performed by the Department of Labor. In addition, while GPO, GAO, and the Library are currently required to have internal mechanisms for investigating and resolving public-access complaints under the ADA, applying the federal-sector regime would extend the Attorney General's authority under Executive Order 12250 to review the three instrumentalities' regulations, to coordinate implementation, and to bring enforcement actions.

GAO is not now subject to executive-branch agencies' authority in most respects, but was originally considered part of the executive branch and remained subject to the authority of the executive-branch agencies until the 1980 enactment of the GAO Personnel Act, which consolidated the appellate, enforcement, and oversight functions that in the executive branch are performed by the EEOC, the MSPB, and the Special Counsel into the function of the GAO PAB and its General Counsel.[76] Applying federal-sector coverage would, with respect to the CAA laws, restore the PAB's responsibilities to the EEOC, MSPB, and Special Counsel, which, unlike the PAB, are fully separate and independent from regulated employing agencies. GAO is already subject to OPM's government-wide regulations and claims-resolution authority under the FLSA.

The Library's internal claims processes are largely modeled on those required and applied by executive-branch employing agencies, but the Library has been exempted

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[76] Legislative history explains that the GAO Personnel Act was enacted to enable GAO to audit the executive-branch personnel programs and agencies established under the Civil Service Reform Act of 1978 without being subject to those same programs and agencies. S. Rep. No. 96-540, 96th Cong. (Dec. 20, 1979) (Governmental Affairs Committee), *reprinted in* 1980 U.S. CODE CONG. AND ADMIN. NEWS 50-53.

from the authority of executive-branch agencies in most respects, with the principal exception being FLRA authority over labor-management relations.[77] Application of federal-sector coverage would, with respect to the CAA laws, extend the authority of the EEOC, MSPB, the Special Counsel, and OPM to include the Library and its employees.

(c) Judicial processes and relief. In most instances, employees at the three instrumentalities are already covered by the same judicial processes as federal-sector employees. However, whereas PAB decisions may be reviewed only by appeal to the Federal Circuit, federal-sector procedures would allow suit and trial *de novo* after exhausting all administrative remedies, even after decision on appeal to the EEOC or the MSPB. On the other hand, GAO and Library employees would no longer have a private right of action under FMLA, and, unlike the CAA, which now provides for judicial review of OSHAct decisions regarding GAO and the Library, final occupational safety and health decisions under the federal-sector scheme are made by the President.

(d) Substantive rulemaking process. In a number of areas, the three instrumentalities are already subject to the same government-wide regulations as are in place in the federal sector. GAO and GPO are subject to OPM's regulations under the FLSA, GPO is subject to OPM's regulations under the FMLA, and GPO and the Library are subject to FLRA's regulations under Chapter 71. However, in a number of instances the three instrumentalities are currently able to issue their own regulations without reference to the regulations in the federal sector, as described at page 33 above in the discussion of the substantive rulemaking process under the CAA option. Coverage by the federal-sector regime would subject the three instrumentalities to uniform government-wide regulations in all areas.

3. <u>Private-Sector Option</u>: Bring the three instrumentalities fully under private-sector provisions of law, including the authority of executive-branch agencies as they administer and enforce those provisions.

(a) Substantive rights. The substantive rights and responsibilities under the current regimes at the three instrumentalities are generally similar to what would be provided under private-sector provisions of law, with the notable exception of the area of labor-management relations where application of private-sector substantive law would grant to employees at the three instrumentalities certain rights, such as the right to strike, unavailable to other federal government employees. There are also a number of other differences between private-sector provisions and the substantive provisions of law currently applicable at the three instrumentalities. For example, the application of private-sector provisions of the FLSA would eliminate most use of compensatory time in lieu of overtime pay. Also, private-sector FMLA provisions would apply at GPO, which

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[77] In an another area that is significant, though not analogous to any of the laws made applicable by the CAA, the Library is also subject to OPM's authority over job classifications.

allow the employer to recoup health insurance costs from an employee who does not return to work; to limit the application of FMLA restoration rights to "key" employees; and to elect whether an employee must use available paid annual or sick leave before taking leave without pay. Finally, GPO, which is not now covered by WARN Act or EPPA rights, would become subject to those laws.

(b) Administrative processes. If provisions of private-sector law were applied, the greatest impact would be in the area of administrative processes. Under private-sector schemes generally, with the exception of occupational safety and health and labor-management relations, the agency's responsibility is limited to investigation and prosecution, without administrative adjudication and appeal.

The consequences of application of private-sector administrative schemes would be different at each instrumentality. The most significant change would be at the Library, where outside agencies now have little role in either investigation and prosecution or in administrative adjudication and appeals. If private-sector coverage applied, an agency outside of the Library would have authority to investigate and prosecute discrimination, FLSA, FMLA, and other laws. At GAO and GPO, the present adjudicatory and prosecutory schemes would be replaced by a new prosecutorial regime handled by agencies ordinarily responsible for private-sector enforcement. For example, FLSA and FMLA enforcement would be handled by the Labor Department in its investigatory and prosecutorial role, rather than OPM and the PAB at GAO and OPM and MSPB at GPO. However, under the currently applicable provisions of law and regulation that govern the federal sector with respect to the FLSA, OPM has authority to direct GPO and GAO to comply, whereas under the provisions of law and regulation that govern the private sector, the Labor Department would have to bring suit to enforce compliance. In the area of discrimination at GPO, rather than appeal rights to EEOC and MSPB, there would be investigation and prosecution by the EEOC, while at GAO, the PAB's role would be replaced by EEOC investigation and prosecution. In the area of occupational safety and health, the enforcement responsibilities for GAO and the Library would be transferred from the OC to the Labor Department, and the Labor Department would also assume these responsibilities for GPO, where currently no outside agency exercises these responsibilities.

(c) Judicial processes and relief. In the area of judicial processes and relief, if private-sector laws were applied, a private right of action would be added under a number of provisions where it does not currently exist. For example, GPO employees would gain a private right of action under FMLA and USERRA. GAO and Library employees would gain an unambiguous private right of action under WARN, USERRA, and EPPA. Moreover, punitive damages are part of the private-sector remedial scheme, whereas they are currently unavailable at the three instrumentalities.

(d) Adoption of substantive regulations. Application to the three instrumentalities of the substantive rulemaking process governing the private sector would resolve concerns respecting independent rulemaking authority under the regimes currently in

place at these instrumentalities. The agencies issuing regulations that govern the private sector have no employment relationship with the community they regulate, unlike the three instrumentalities themselves when they promulgate substantive rules. Moreover, a switch to private-sector coverage in the areas of OSHAct, WARN Act, and EPPA would remove GAO and the Library, which are currently subject to CAA substantive rules in those areas, from the section 304 process of adoption and issuance of substantive regulations.

The three instrumentalities are currently covered by a number of civil service and other protections which have no analogue in the CAA and which the Board does not undertake to review here. The Board determined that such substantive rights under federal-sector or other laws having no analogue in the CAA, and processes used to implement, remedy, or enforce such rights, should not be affected by the coverage under any of the options. However, to avoid creating duplicative rights and remedies, the application of the CAA or of analogous federal-sector or private-sector provisions should supersede existing provisions affording substantially similar substantive rights or establishing administrative, judicial, or rulemaking processes to implement, remedy, or enforce such rights.

D. Recommendations

1. The current "patchwork of coverages and exemptions"[78] at GAO, GPO, and the Library should be replaced by coverage under either the CAA or the federal-sector regime.

In its Section 230 Study, the Board described the current systems in place at the instrumentalities, and stated:

> Congressional decisions made over many years in different statutes subject the three instrumentalities to the authorities of certain executive-branch agencies with respect to certain laws, but exempt them from executive-branch authority with respect to others. . . . The result is a patchwork of coverages and exemptions from the procedures afforded under civil service law and the authority of executive-branch agencies, and from the procedures afforded under the CAA and the authority of the Office of Compliance."[79]

In preparing this 1998 Report, the Board considered whether to recommend that serious gaps in coverage at the three instrumentalities be filled without fundamentally changing the regimes already in place at each instrumentality. However, the Board

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[78] SECTION 230 STUDY at iv.

[79] *Id*.

unanimously rejected that piecemeal approach. The "patchwork" nature of existing coverages and exemptions yields complexity and areas of legal uncertainty in coverage at the three instrumentalities. Furthermore, in several areas, the three instrumentalities are not now subject to the authority of any outside regulatory or personnel agency to promulgate regulations, resolve claims, or exercise enforcement authorities.

Accordingly, the Board unanimously concluded that this current system is less comprehensive and effective than, and should be replaced by, coverage under one of the options described in the previous section. The Board also agreed unanimously that coverage under the private-sector regime is not the best of the three options it considered. However, the Board did not reach a consensus as to whether the CAA or the laws and regulations applicable in the federal sector should be made applicable to GAO, GPO, and the Library. Instead, for the reasons stated below, Members Adler and Seitz concluded that the three instrumentalities should be covered under the CAA, with certain modifications, and Chairman Nager and Member Hunter concluded that the three instrumentalities should be made fully subject to the laws and regulations generally applicable in the federal sector.

2. Members Adler and Seitz have concluded that GAO, GPO, and the Library should be covered under the CAA, including the authority of the Office of Compliance, and that the CAA, as applied to these instrumentalities, should be modified – *(a)* to add Office of Compliance enforcement authorities as recommended in Part II of this Report and *(b)* to preserve certain rights now applicable at the three instrumentalities.

Members Adler and Seitz concluded that the three instrumentalities should be brought under the CAA primarily for two reasons. As noted above, the Board in the Section 230 Study decided that its statutory mandate was to evaluate the "comprehensiveness and effectiveness" of the existing statutory and regulatory regimes at the three instrumentalities by comparing them to the regime under the CAA. The application of the CAA to the three instrumentalities would assure that this standard of "comprehensiveness and effectiveness" is achieved throughout the legislative branch.

Second, all laws made applicable by the CAA are administered by a single Office. The advantages of this unified structure are that employees can turn to a single place for assistance; efficient and uniform procedures under a model administrative dispute resolution system have been established for various types of complaints; and a single body of substantive regulations and decisions, which is as internally consistent as possible within the constraints of applicable law, is being developed. Extending the jurisdiction of the Office to include GAO, GPO, and the Library for all of the laws made applicable by the CAA will foster such efficient and consistent administration of the laws at the three instrumentalities, and will put the expertise and resources of the Office of Compliance to full use throughout the legislative branch.

The conclusions of Members Adler and Seitz are premised and dependent upon the CAA's being applied to the three instrumentalities with certain modifications. First, the Act should be amended to enlarge the Office of Compliance's enforcement authorities as recommended above in Part II of this Report. The Board there described its determination that certain additional provisions of CAA laws should be made applicable to all employing offices of the legislative branch that are now covered under the CAA, and, for the reasons discussed above, such additional provisions should be made applicable to GAO, GPO, and the Library as well.

Second, the rights extended by the CAA in the House and Senate and the smaller instrumentalities are subject to certain limitations that do not apply under the regimes now at GAO, GPO, and the Library. These limitations appear to have been included in the CAA to preserve the independence of the House and Senate, to protect against publicity attendant to complaints or litigation that Congress believed might unduly affect the legislative and electoral processes, and to avoid labor activities that Congress was concerned might, in certain situations, engender conflict of interest or interfere with fulfillment by Congress of its constitutional responsibilities. However sound these reasons may have been with respect to Congressional offices for which the CAA was principally designed, these reasons have less force as to GAO, GPO, and the Library in view of their respective roles in the legislative process.

Members Adler and Seitz therefore believe that limitations such as those imposed by sections 220(c)(2)(H) and 416 of the CAA should not apply at GAO, GPO, and the Library. Section 220(c)(2)(H) of the CAA establishes a process by which the Board, with the approval of the House and Senate, may remove an office from coverage under some or all provisions of labor-management law if "required because of – (i) a conflict of interest or appearance of a conflict of interest; or (ii) Congress' constitutional responsibilities."[80] No such process applies under labor-management law now applicable at GAO, GPO, and the Library, and none should be made applicable to them under the CAA. Section 416 of the CAA makes the counseling, mediation, and administrative hearing processes of the CAA "confidential." The CAA, in being made applicable to these three instrumentalities, should not impose confidentiality requirements except to the same extent that confidentiality is imposed in proceedings by the executive-branch agencies implementing the CAA laws and to the extent necessary to facilitate effective counseling and mediation under §§ 402 and 403 of the CAA.[81]

3. Chairman Nager and Member Hunter have concluded that the federal-sector model should apply, including the authority of executive-branch

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[80] Section 220(e)(1)(B) of the CAA.

[81] *Cf.* 5 U.S.C. § 574 (duties of confidentiality in mediation or other proceedings under the Administrative Dispute Resolution Act).

personnel-management and regulatory agencies to implement and enforce the laws.

Chairman Nager and Member Hunter have concluded that GAO, GPO, and the Library should be brought under the statutory and regulatory regime that applies generally in the federal sector, including the authority of executive-branch agencies as they administer and enforce laws in the federal sector, for several reasons. Insofar as the present statutory scheme is not "comprehensive and effective" because it does not provide employees access to an outside regulatory entity to promulgate regulations and resolve claims, this problem could be solved by extending the authority of the executive-branch agencies over the three instrumentalities.

GAO, GPO, and the Library are already subject to many of the same personnel statutes that apply generally in the federal sector and, in some instances, to the authority of executive-branch agencies as well. Making the federal-sector regime fully applicable would be less disruptive to the three instrumentalities than replacing the coverage already in effect with either the CAA or private-sector coverage.

Furthermore, employment at these three instrumentalities is more akin to the large civilian departments and agencies of the executive branch, for which federal-sector laws and regulations were designed, than the employing offices of the House and Senate, for which the CAA was primarily designed. For example, substantive provisions of federal-sector statutes and regulations in such areas as overtime pay, family and medical leave, and advance notification of layoffs are designed to dove-tail with merit-based retention systems, position-classification systems, leave policies, and other personnel practices that are found generally in both the executive branch and the three large instrumentalities, but that are not common in either House and Senate offices or the private sector. Also, while federal-sector law in some respects limits the right to sue, it also affords administrative procedures and remedies that exceed what are available under the CAA or in the private sector. Such procedures have traditionally been seen as appropriate to avoid politicized employment and to provide for accountability in large, apolitical bureaucracies. In congressional staff, where political appointment is generally seen as proper and where accountability is achieved through the electoral process, these federal-sector procedures and remedies have been considered inappropriate. However, the three instrumentalities have traditionally been seen as having many of the attributes of the large, apolitical bureaucracy, and employment practices have largely followed the federal-sector model.

Placing GAO, GPO, and the Library under federal-sector coverage would also have the salutary effect of giving Congress the experience of living under the laws that it enacts for the executive branch. According to the authors of the CAA, a principal goal of that Act was to make Congress live under the laws that it enacts for the private sector, so that Congress can better understand the consequences of those laws. Congress might likewise better understand the consequences of the laws that it enacts for the executive branch if the large instrumentalities of Congress were fully subject to those laws.